

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV2008/1149

BETWEEN:

FRINSTED CONSULTANCY SERVICES (ST.LUCIA) LTD.

Claimant

and

GUSTAVE GENERAL CONSTRUCTION LTD

Defendant

Appearances:

Mr Horace Fraser for the Claimant

Mrs. Kimberly Roheman for the Defendant

2010: 16th September

2011: 15th February

31st March

2012: 18th July

JUDGMENT

[1] BELLE.J: In January, 2008 the Claimant entered into a written contract with the Defendant whereby the Defendant subcontracted the services of the Claimant to effect electrical installations at four houses in Cap Estate, Gros Islet for the sum of \$144,000.00

[2] The Defendant claims that he was forced to terminate the contract due to the Claimant's breach and the Claimant claims the total contract balance in the sum of \$111,300.00 because of the Defendant's breach in terminating the contract.

The Contract Terms

[3] The Contract stated under the heading "Exclusions".

"115V Circuits

Light fittings (client preference)

Alarm System
Fans (clients preference)
Pool lights and Niche

[4] Under the heading General Works the contract states:

- (a) Supply & install all electrical fixtures such as switch outlets, in-door and out-door lighting, garage lighting and accessories.
- (b) All switches and outlets (white) as standard. All panels are to be the BS 7671 standards.
- (c) All exterior outlets to be water proof.
- (d) All earthlings should be 6' deep (no less).
- (e) All switches and outlets at standard height.
- (f) All pipes and wires should be hidden.
- (g) Any cable to be transferred to the exterior should be buried no less than two feet deep.
- (h) A schematic of all piping in walls and underground should be delivered to the Contractor for future reference.
- (i) All LUCELEC mains will be determined by the main Contractor.
- (j) All wires are to be British standard colour.
- (k) The Sub contractor or his designee's duty is to pay daily site visits to ensure all is well with the works that have been contracted out to the company and make good to the responsibility.
- (l) VO will be issued by Contractor for any extras or changes, Sub contractor will issue quotation for the VO.

[5] Under the rubric "Payments" the contract states:

10% mobilization on total cost of contract at starting.

All payments on contract should be invoiced five working days before date of collection at Gustave General Construction Office.

[6] Under "Responsibility of the Contractor" the contract states:

"All lighting fixtures will be Gustave General Construction's responsibility to deliver to the Sub contractor for installation, most of these items should be installed only when the building have been completely secured.

Gustave General Construction will not be responsible for any damages or broken items after safely handing over fixtures to the Sub Contractor; (items should be carefully inspected before acceptance). Items required for the Contractor should be given prior notice in writing of three days, to the office of Gustave General Construction Ltd before delivery.

Retention will be held by the Contractor until the inspection has been passed relevant authorities. This will be released seven days later.

Notice on concrete pouring will be 24 hour notice for the attendance of the Sub contractor.”

The Pleadings

- [7] In their Statement of Claim the Claimant stated that in the month of January, 2008 the Claimant Frinsted Consultancy Services (Frinsted) and the Defendant Gustave General Construction (Gustave) entered into a written contract wherein the Defendant subcontracted the services of the Claimant to effect electrical installation and material to four (4) houses at Cap Estate in the Quarter of Gros-Islet in the Island of Saint Lucia.
- [8] In paragraph 4 of the Statement of Claim the Claimant stated that the Claimant commenced work on the project soon thereafter and encountered major problems in the execution of the project mainly due to unfinished work, poor workmanship on the part of the Defendant's employees and servants. There were also alterations to walls and changes in design resulting in extra time being spent to relay conduits. The Claimant also alleged that the Defendant failed to issue up-to-date drawings, provided late funding for ordering mains supply cable, made late payment for work completed and as a result of lax security failed to prevent theft of materials and tools from the site office. These problems and the like all caused the project to fall behind schedule.
- [9] The Defendant denied any knowledge of the unfinished work and poor workmanship on the part of the Defendant's employees and servants. The Defendant also said that the Claimant never complained of unfinished work or poor workmanship which would have impacted the Claimant's scope of work except by letter of May, 2008 when payment was in issue and when the allegations made at the time were denied.
- [10] The Defendant also alleged that the Claimant failed to particularise the alterations to walls and changes in design alleged to have resulted in the Claimant spending extra time in relaying

conduits. The Defendant said that any extras charged for by the Claimant and included in the Claimant's letter of March 2008 were paid for.

- [11] The Defendant insisted that all drawings were provided and any changes in design on site were minor and did not require further drawings.
- [12] The Defendant was also of the view that all losses resulting from alleged theft of materials and tools were reimbursed. In relation to security according to the Defendant in the initial stages the site was maintained without security but later on security was provided.
- [13] The allegation of late payment was denied and a payment schedule was set out in the pleadings in support of this denial.
- [14] The Defendant pleaded that it was expressly orally understood and agreed between the parties that payment would be issued for work performed.
- [15] It would therefore have been necessary for the Claimant to prove the allegations made in its claim and for the Defendant to do the same in relation to its counter-claim. Below I deal with the Claimant's allegations under the head of each allegation made and show the response and the manner in which the court intends to resolve the matters.
- [16] The Court identifies the following legal issues which are also identified in the Pre_Trial Memoranda of both the Claimant and the Defendant:
- [17] On the Claimant's Claim, the Legal Issues are:
 - (a) Whether there was a breach of contract by the Defendant.
 - (b) If yes whether the breaches were breaches of conditions or warranties.
 - (c) If there was a breach of contract whether the Claimant terminated performance of the contract and if so was that a sufficient communication of the decision to terminate by the Defendant's lawyers letter of 12th June 2008 and if not, whether the contract was affirmed so that it remained in force.
 - (d) If the contract remained in force whether the Claimant failed to perform its contractual obligations.

- (e) Whether the Claimant is entitled to claim as special damages payment for works not actually performed.
- (f) Whether the Claimant can claim the full contract price where the works have not been substantially completed.

[18] The Defendant also identified the following issues on the Counterclaim:

- (a) Whether the Claimant was in breach of contract:-
And if so
Whether the breaches were breaches of conditions or warranties.
- (b) Whether the Defendant accepted the breach or terminated the contract.
- (c) If terminated whether the Defendant's letter of 6th June 2008 amounted to a sufficient termination.
- (d) Whether the Defendant mitigated its losses.
- (e) On termination of a contract by an innocent party what is the measure of damages recoverable?

[19] The parties agreed that the works were governed by terms of a written contract and that the Defendant terminated the contract.

The Claimant's Evidence

[20] The Claimant listed a number of complaints which caused delay in the project and made it impossible to complete the work. Both of the Claimant's witnesses summarized the problems as follows:

"Another factor that plagued the Company's execution of its work on the project was the lack of co-ordination of work on the project. The Defendant's workers/servants worked in a haphazard manner working between the houses, returning to each house to complete work without fully completing one house then moving to another. This was to facilitate the Defendant's workers'/servants' inability to fully complete any of the houses because they were behind schedule. This prevented the Company's employee from fully completing work on one house and moving on to another. At the time the Defendant stopped the Company from continuing performance under the contract all electrical works were about 65% complete.

.....
The project was also plagued by lack of continuity in work. Because the Defendant's workers/servants were behind in their schedule work the Company's employees would only work when the Defendant's workers/servants completed certain aspects of the project it mean that the Company's employees were not fully engaged at all times on the site and this cost the Company money. The company could not keep a full work force on site and pay them for doing nothing so at times when there was no work the Company's employees would not be on site. The Company made this specific complaint to the Defendant by letter dated 5th May, 2008.

.....
On the 28th May, 2008 while the project was ongoing the Defendant wrote a letter to The Company indicating its decision to withdraw part of the contract from the Company and on the 6th June, 2008 the Defendant wrote another letter to the Company terminating the contract between the Company and itself.

On 12th June, 2008 The Company caused a lawyer's letter to be written to the Defendant demanding that it allow the Company to complete the project or alternatively pay The Company according to the service cost as per the contract but to no avail."

The Defendant's Evidence

[21] Apart from denials of most of the allegations made by the Claimant, the Defendant also exhibited letters exchanged between the parties during the months of February 2008 to June 2008. These letters demonstrate the way in which the dispute before the court arose and developed. The letters are set out below:

[22] On 18th February, 2008 the Defendant sent the following letter to the Claimant.

Graham Mills
CEO
F.C.S Installations

Please be advised of the following:

1. The office of Gustave Construction Ltd operates from Monday to Friday from 8.00 a.m. –5.00pm. All business transactions should be done during those hours.
2. Any invoices or correspondence with reference to the construction should be hand delivered to the Secretary of Mrs Gustave on a person to person basis.
3. Please be reminded that on Saturdays I try to keep away from any financial transactions before sunset, after sunset I commence business.
4. We will be pleased to settle on schedule all payments to be met according to the stage of work completed.
5. The need of more man-power is required on site in order to accommodate the speedy progress of the work.
6. There is concern of insufficient materials on site. In order to keep up with the production on site please resolve this as soon as possible.
7. Within the next two weeks we will be working on lot 120 to push the foundation and the guest cottage of Lot 122.

8. All other things seem to be going pretty well, so we thank you and your team for the progress to date.
9. Please give me an idea of the total cost of materials that were stolen, with a list of the various items.

It is imperative that we continue the cordial business rapport that we have commenced, as a result I expect your loyalty to Gustave General Construction to be primary and not to any other party associated with this project.

In so saying we once again thank you for your progress in your work to date.

Thank you,

David Gustave
Managing Director

[23] On April 8th, 2008 David Gustave again wrote in relation to the Claimant's demand for payment for Extras Associated with Electrical Installation

1. Speaker Extra: not yet completed, there are no pull wires
2. A/C Extra Quoted: only 30% of the work completed
3. TV Alterations: as per invoice dated February 27 2008, Further to site visit with Mr Legge, the quoted amount for all 4 houses TV alterations is \$2000.00, which would be \$500 per house, which means that the 3 houses should total \$1500 and not \$1650 as stated by your invoice. However only 30% of this work is completed since there are no outlets for the TV.
4. Please specify the relation of the \$300 charge noted on the invoice.

Thank you,

David Gustave
Managing Director

[24] In response to this letter the Claimant wrote two further letters requesting payment for the Second Fix Materials.

[25] On 23rd April 2008, Mr. David Gustave wrote the following letter:

Graham Mills
CEO
F.C.S Installations Ltd

Dear Mr. Mills

Re: Electrical Installation

Due to current stage of the Project, we request that all cables be pulled in and secured. We are willing to provide the necessary blank plates to protect the wires. If this is possible, we kindly suggest that temporary fish-wire be pulled through to facilitate later insertion of the cables.

Please be advised that we at Gustave General Construction Ltd., are not prepared in any way to allow cutting and unnecessary 'builders-work' after or during the finishing stages. And the above request is mainly to safeguard and maintain this position.

Furthermore, please note that this is the third occurrence of this request and we therefore expect a timely and relevant response from you. Also, it is noted that electrical works have not been pursued on this project for twenty (20) days now and this is of much concern to the management team of this project.

We look forward to your cooperation and your alacrity of response.

Thank you,

David Gustave
Managing Director

[26] In reply to this letter the Claimant wrote the following on 26th April 2008:

Gustave Construction
Beausejour
Gros Islet

Dear Mr. Gustave,

Further to your letter dated 23rd April 2008, we would advise you that we requested payment for second fix materials (cables included) on the 4th March 2008, we also informed you at our last meeting that our intention to wire all completed properties and install all panels and lay in mains supply cable to facilitate testing of completed circuits upon internal decoration.

It has been weeks since your reply and we would have completed wiring of all units by now if you have issued payment for second fix materials, we would also point out that only verbal instruction have been given for all alterations and extras.

We would also bring to your attention that the masons working on the last cottage being constructed have buried our conduits with concrete, and in our opinion the masons should dig this out as it is very time consuming to break out concrete, we have in the past had to break wall to locate conduits not marked for us at our expense with extra time required.

Our intention is complete the contract on time and if requested payments are on time progress will be achieved.

Assuring you of our best attention at all times.

Graham Mills
F.C.S Ltd

[27] The reply from Mr Gustve of the Defendant was as follows:

Graham Mills
CEO
F.C.S

Dear Sir,

Re: Electrical Installation

In response to your letter dated 28th April 2008, we would like to remind you that the mobilization amount issued to you was catered for all four residences. Furthermore, our contractual agreement clearly defined payment as "based on work completed." On these grounds we safely maintain the position that further payment for 'second fix' will not be possible.

The presence of electricians is necessary at the current stage of the works, and to date it is evident that you have deliberately halted the works progress. Also, the impression received based on your lack of attendance and cooperation states clearly that your company has no reliable interest in the health and mobility of the project.

As a result of your negligence we hereby declare that all further matters pertaining to our contract will be addressed on a legal platform.

Please be advised that the work has to continue in a timely fashion and if we don't receive a favourable response by Wednesday 7th May 2008, then, Gustave General Construction Ltd will be forced to declare the contract as "breached" and no longer in effect, this creating room for invitation for your replacement.

We look forward to your cooperation and alacrity of response.

Thank you

David Gustave

[28] After a further exchange of letters in which the Claimant continued to ask for payment for extras among other things and indicated their willingness to continue the work, the Defendant replied on 28th May, 2008 indicating that,

“To date, all agreements both orally and verbally has evidently been breached by your firm and Gustave General Construction Ltd. has been left with no other choice but to withdraw the contract for Kevin Moretons Residence whereby you will no longer participate in its electrical installation.

As a result, any outstanding funds payable to you will be subject to a revision before any payments can be issued.

[29] The letter ended:

Please be advised that the work has to continue in a timely fashion and we expect your fullest cooperation and favorable response in no more than 24 hours.
Thank you,

David Gustave
Managing Director

[30] Finally on 6th June, 2008 Mr David Gustave wrote:

Graham Mills
CEO
F.C.S Installations Ltd

Dear Sir,

Re: termination of contract

This letter serves to inform you formally, that the “Electrical” job for the Legge’s Residence in Sea breeze Heights in Cap estate, has been stripped from F.C.S installations Ltd. Due to evident “breach of contract”

Consequently, all personnel of F.C.S Installation Ltd. is now prohibited to enter the site. Failure to do so will result in security escorting you off, or taking other appropriate restraining action.

Furthermore, as of Monday 09th June 2008, your erected sign will be taken down since it no longer represents truth.

The staff at Gustave General Construction Ltd. would like to thank you for your input during the foundational stage of this project.

Yours Respectfully

David Gustave
Managing Director

[31] It is clear and evident from these letters that the Claimant was asked to continue the work by 8th May 2008 but refused to do so citing non-payment for extra work and for second fix materials and the way in which the work was allotted, causing breaks in the continuity of the work.

[32] The question must arise at this time as to whether the behaviour of the Defendant constituted a breach that went to the root of the contract. Obviously at the time of the exchange of the letters the Claimant did not allege that there was a breach of the contract. It was therefore left up to the Defendant to decide whether the Claimant's behaviour was a breach of contract and they certainly came to that conclusion.

Arguments

[33] The Defendant argued that the Claimant's claim should be dismissed because the Claimant made allegations which were not proven such as the allegation that the mobilization fee was not sufficient, which was not pleaded, that the Defendant failed to attend meetings, that the Defendant paid late and did not pay for the extras.

[34] The Defendant denied that there was evidence of these allegations. They stated that the evidence pointed to shoddy work on the part of the Claimant. The Claimant also failed to follow the stipulations of the contract and tried to obtain work which had been specifically excluded in the contract and stopped working for 20 days and refused to recommence the work when asked to do so. They considered this an anticipatory breach which was accepted by the Defendant and the contract was terminated on the basis of that breach which indicated that the Claimant was unable to complete the contract.

[35] As a consequence of the Claimant's breach the Defendant counter-claimed for damages.

[36] The Claimant argued that they were willing to complete the contract but were forced to stop working because of the Defendant's failure to attend meetings, to pay for extras and variation orders, which had to be done because of the shoddy work of the Defendant's workmen who damaged their work and covered up conduits. This made it impossible for them to continue the work and they stopped and informed the Defendants of the reason for the stoppage.

- [37] The Claimant's counsel emphasized three main issues. He argued the Claimant presented two invoices to the Defendant in the sums of \$50,000.00 and \$65,000.00 for the supply of cable and panels which the Claimant referred to as "Second fix funding."
- [38] The Claimant argued that they requested the second fix funding in advance to facilitate the putting of cable in the conduits before the Defendant's workers/ servants could plaster the walls because after the walls are plastered it would be difficult to get the cable into the conduits.
- [39] The Defendant's response to the Claimant's request was that the works had not been performed for the sums requested and the main cable was not within the scope of the works or the contract price.
- [40] The Claimant's Counsel argued that more than any other allegation the request for advance monies from the Defendant was the main reason for the breakdown of relations between the parties.
- [41] Counsel further argued that there was no time line for completion of the contract. There could be no claim for delay because the homeowners had not sued the Defendant because of delay. It was not in the contemplation of the parties to prohibit a demand payment before work was done.
- [42] Counsel was of the view that the Defendant totally confused itself in relation to second fix material referred to as "mains cable". The Claimant's understanding of this reference to "cable to be transferred to the exterior.." meant that it was part of the contract to supply cable to connect to the exterior.
- [43] This misunderstanding of the contract as far as the Claimant was concerned led to the termination of the contract on a false premise.

Analysis of the facts

- [44] In relation to the terms of the contract and the matter of the cables leading to the exterior the relevant clauses of the contract are under General Works. The Clauses are:

- (a) Supply and install all electrical fixtures such as switch outlets, in-door and out-door lighting, garage lighting and accessories.
- (b)
- (c) All exteriors outlets to be waterproof.
- (d)
- (e)
- (f) All pipes and wires should be hidden.
- (g) Any cable to be transferred to the exterior should be buried no less than two feet deep.
- (h) A schematic of all piping in walls and underground should be delivered to the Contractor for future reference.
- (i) All LUCELEC mains will be determined by the main contractor.

[45] At best it can be argued that clause (g) which speaks to all cable to be transferred to the exterior being buried no less than two feet deep was ambiguous. The common sense approach would have been to seek an explanation. But by demanding money and refusing to accept that the company could do the work even when told so by the contractor, reveals the desire to expand the contract unilaterally or refuse to work if it was not expanded.

[46] But there had been no agreement to increase the contract price, hence if the completion of this aspect of the contract would require sums not contemplated in the contract to be paid then this would have to be justified. On the other hand there was no indication that by excluding the LUCELEC mains installation from the contract the Claimant would be paid less than the promised contract price.

[47] It should also be noted that the contract provided for retention which would be held by the contractor until inspection. If the Defendant's position amounted to an exclusion which would have affected the Claimant's contract sum the matter would be dealt with at the time of retention. If this constituted a breach of contract then it was open to sue for breach of contract. The Claimant itself admitted that the work for which it was billing the Defendant had not been done and there was no allegation that the monetary compensation for the contract was being reduced.

[48] Clause (i) ("All LUCELEC mains would be determined by the main contractor") of the contract should also have alerted the Claimant to the fact that the task of connecting to the mains was a

matter for discussion, at best, rather than one justifying a demand for money. In the premises I find that the demand for payment for performing this task was totally unreasonable.

- [49] The general scheme of the contract was that “all payments on contract should be invoiced five working days before date of collection at Gustave General Construction Office.” While it is true that there was nothing prohibiting the payment of money in advance, this clause cannot be said to require that payment be made in advance since it would always be left open to the contractor to ask for justification of any claim made for payment during the five day period before payment. Furthermore I believe Gustave’s witnesses who say that the agreement was that payment would be made after work was done. The exception to this of course was the mobilization fee.
- [50] In spite of this, the Claimant should still know the scope of its job at any phase of the project and should conduct the necessary works for which they would be paid. The Claimant’s principals did not complain that they did not understand the scope of their work.
- [51] The important point being made by the Defendant is that the Claimant had not completed all of the work for which they had in fact been paid and they should have been looking to cure this before asking for money for work they were yet to do. Based on the evidence I accept this as a true statement of the facts. It was therefore reasonable for the Defendant to assume in the circumstances that the Claimant wanted money in advance to complete work which it should have done. Indeed the implication was that the Claimant was having trouble completing the work it was contracted to do.
- [52] In any event the best way for either side to prove these technical points would be with expert evidence. But neither party adduced expert evidence. The basic principle is that he who alleges must prove. If the Claimant is not able to prove that its demands for payment for second fix material and for attaching LUCELEC mains were reasonable then it cannot prove its case with regard to the Defendant’s decision to terminate the contract on the basis of the Claimant’s breach.

LAW

[53] The Claimant claims that the payment of fees is a promissory condition the Defendant undertook to fulfil. A failure on the part of the Defendant to perform what is due from him under the contract is a breach of contract. But the operative word here of course is "due." Could it be said that money is due in advance based on the contract exhibited in this case? I think not.

[54] The issue of second fix materials should have been resolved with reference to all of the terms of the contract, including the payment of the contract price and what would be due based on the contract price.

The Reason for the Termination

[55] I am also of the view that if the Claimant thinks that the contract was terminated because of delay, it is mistaken. The reason for termination, was unreasonable demand for money before work had been completed and the failure to continue working and complete the contract.

[56] The Claimant treated the failure to pay the sums demanded as a breach and filed this claim, but it could not have been a breach that went to the root of the contract since the Claimant asked to be permitted to continue the work prior to describing the situation as a breach. The Claimant could have continued working for the contract price and if there was an excess due after the retention was paid, sue for the excess. The work stoppage coupled with the demand for money not yet "due" was in my view the real reason for the termination of the contract.

[57] The stoppage of work is sufficient for the Contractor to determine that the Claimant is unable or unwilling to complete the contract. If the Claimant was willing to complete the contract, it should have recommenced work as soon as its breach was pointed out.

[58] The Defendant on the other hand would have been weary of waiving the Claimant's breach because of concern for delays in the future. But this does not mean that the reason for the termination was delay.

[59] I do not agree that because the Defendant admitted that there was confusion over the requirement for second fix and that there was no specific timeline and no demand for damages from homeowners that delay could not be a concern. Indeed delay was a concern because as the Defendant's counsel has argued, even if there was no timeline in the contract there would be an implied term that it would be completed in a reasonable time.

[60] In Hudson's Building and Engineering Contracts Eleventh Edition Volume 2 Paragraphs 9.0007 and 9.024 the author states:

"Where a contract is for defined work, so that there will be an express or implied obligation to complete ,completion within a reasonable time will be implied if no time is specified in the contract.

Reasonable time is, therefore, primarily a question of fact and must depend on all the circumstances which might be expected to affect the progress of the works."

[61] Persons knowledgeable in the construction industry would know what a reasonable time is. But delay did not go to the root of the contract in this case.

Mobilization fee

[62] What occurred was an apparent misunderstanding of the terms of the contract between the parties. An example of the misunderstanding between the parties can be seen in the argument over the mobilization fee. The court finds that the issue of sufficiency of the mobilization fee is irrelevant unless the contract specifically states that the mobilization fee should be sufficient for a specific task beyond bringing materials and labour to the construction site.

[63] A mobilization fee in the court's view is what it says. It mobilizes the contractor to start work. The Claimant would have to show how the sum given as mobilization was unreasonable in the circumstances of a construction contract. But in any event, its insufficiency was not cited as a breach of contract. It is presumed that at a later date the contractor would bill for the work done. The mobilization fee encouraged the Claimant to commence the work but the commencement date, agreed by the parties in the contract is the operative date identified in the contract for the work to begin, regardless of the size of the mobilization fee.

- [64] But in spite of the method of payment of the mobilization fee I find that based on the evidence it was clearly the scheme of the contract and the intention of the parties that the Claimant would complete a phase of work and follow that with an invoice.

Meetings

- [65] The Claimant has not proved that the Defendant's Mr. Gustave failed to attend meetings when he was expected to do so. This was denied and the Claimant has failed to prove that this was the case. Indeed in the letter of 26th April 2008 the Claimant refers to a matter which was discussed at a meeting between the parties.

Payment / Overpayment

- [66] The Claimant alleged late payment, but this was also denied and again the Claimant has not proved that this was a problem.
- [67] Indeed the Court recognizes that the Defendant's view was that the Claimant was overpaid. This view would have influenced the decision not to pay the monies requested. The calculation was based on the Claimant's inability to prove that work which the Claimant billed for had been completed. But this was in keeping with the Claimant's argument that they had to fix the Defendant's workers' shoddy work. It is therefore logical to assume that work which should have been done by a certain time was not done until the work was assessed no payment was made.

Claim for special Damages in the sum of \$111,300.00

- [68] The Claimant did (not) attempt to resume the work at the worksite after termination in spite of the demand to complete the project. The series of letters referred to above and relied on by the Defendant David Gustave proves the time line pursuant to which the Defendant decided that the Claimant was not able or willing to return to complete the contract and therefore dismissed the Claimant as a subcontractor. It is clear that the Defendant did not recommence work when asked to do so by the Defendant. Instead the Claimant continued to demand money for work which had not been done.

Whether the Claimant brought the contract to an end by its letter demanding payment.

- [69] The Claimant's letter demanding payment was sufficient to indicate an inability to perform the contract and constituted a breach of contract. I also find that the Defendant's letter of June 6th 2008 was sufficient to indicate an acceptance of the breach and termination of the contract since the circumstances it referenced showed that the Claimant could not and would not continue working under the existing conditions of the contract. The Defendant's letter of 6th June 2008 was sufficiently clear to establish the basis for the dismissal and the date of termination.

Anticipatory Breach

- [70] In *Spiricor of Saint Lucia Limited v Attorney General of Saint Lucia* Civil Appeal No.3 of 1996 Byron C.J. stated as follows:

"The legal principles are not controversial. It is clear that conduct, which inevitably leads to the conclusion that a party to a contract will not be able to perform, amounts in law to a repudiation of the contract. Willingness to perform is irrelevant if it is evident that there is no ability to do so. The contract becomes determined if the other party adopts the repudiation by so acting as in effect to declare that he too treats the contract as at an end."

- [71] Applying the aforesaid principles to the facts of this case, it is evident that the Claimant was unable to complete the contract without assistance. The Court notes the Claimant's complaint about the mobilization fee. Next the Claimant complained about changes in the contract and the cost of doing over work which had been damaged. But Mr Avery Phillip a knowledgeable and experienced contractor used by the Defendant to complete the work, stated under cross examination that these kinds of challenges occur all the time in construction contracts. I conclude therefore they are not a basis for stopping the work.

- [72] I think that objectively the Defendant was entitled to assume that the Claimant was not willing to use established procedures such as arbitration or negotiation in meetings to settle issues. The Claimant preferred to stop working. This unwillingness to work through the difficulties and accept payment at the end of completed work displayed a lack of interest in completing the job. The Defendant was therefore entitled to repudiate the contract.

Did the defendant mitigate losses by seeking an alternative contractor?

- [73] I conclude that the answer to this question is yes. The Defendant paid Mr Avery Phillip to complete the work and was obliged to fix some things which the Claimant had not done correctly. Based on the court's calculation the cost of the items for which the Defendant had to pay and which would not have been covered by the original contract amount to \$ 9,500.00

Claim for General Damages

- [74] The Claimant's Claim for general damages fails. The Claimant has failed to prove that the Company suffered any Damages as a result of the loss of the contract, since the loss of the contract was their fault for failing to demonstrate either the ability or the willingness to complete the contract.

Counterclaim

- [75] In the counterclaim the Defendant prayed for the following:

Particulars of Special Damages

1.	Cost of 15 2" pipes supplied for three houses	\$675.00
2.	Cost of Incorrect shaver boxes, and labour for re-installation	\$1,200.00
3.	Cost of incorrect positioning of switches and outlets Lot #123, Lot#122, Lot #121	\$6,000.00
4.	Cost for protection of conduit and leaving pipes open Lot#123, Lot #122, Lot#121	\$300.00
5.	Purchase of ¾" conduit (insufficient material on site)	\$200.00
6.	Cost for decking pipe work:- 6 days for Lot #122 Main Building 2 weeks for lot 121 Main Building 2 days lot #123 Main Building 4 days lot 3123 Guest Cottage	\$4,500.00 \$7,500.00 \$1,500.00 \$3,000.00
7.	Cost for pouring concrete or block work \$1,000.00 per Day/per house (3 houses) 6 weeks	\$90,000.00
8.	Cost for schematic floor layouts of pipes	\$2,000.00
9.	Take on labour	<u>\$4,490.00</u>
		\$121,365.00

- [76] The Claimant argued that the Defendant's counter-claim must fail because:

(a) No documentary proof was presented to justify the figures

- (b) No evidence was forthcoming from the Defendant's witnesses to show the Claimant caused such expenditure.
- (c) The Claimant was not in breach of contract.
- (d) Mr. Gustave admitted in cross examination that it is difficult to differentiate between figures that are attributable to the Claimant and those are attributable to the substitute contractor Mr. Avery Phillip.
- (e) Mr. Gustave agreed in cross examination that pouring concrete (the largest figure being claimed) was not a function of the Claimant.
- (f) A fortiori Mr. Gustave admitted that items 1,5,6,7,8 and 9 of the counter-claim were things that the Defendant had to do in relation to the project anyway.

[77] As far as the evidence of items 1,5,6,7,8 and 9 are concerned , I find the that Claimant is correct with the exception of item 8 because evidence shows that the Claimant was supposed to produce the schematic but never did. The Defendant therefore had to bear the cost of this item above and beyond the contemplation of the contract. Mr Avery Phillips did give evidence about the work he had to do which evidence is accepted by the court. I also conclude based on this evidence that there would have been some work which had to be redone. This was not contemplated by the contract and would constitute special damages.

[78] I therefore calculate the sum due for special damages to be \$9500.00.

[79] There was no argument offered in relation to general damages on the counter-claim. In *Hadley v Baxendale* (1854), 9 Exch 341 at page 354 Alderson, B delivering the decision of the court of Exchequer stated:

“ Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties , at the time they made the contract, as the probable result of the breach of it.”

[80] In my view the parties in this matter could be presumed to have contemplated that in the case of a breach such as that which occurred in this case, the result would have been that the contractor/Defendant would have to find another electrical sub-contractor to complete the work

which was not completed by the Claimant, possibly at additional cost. Consequently the Claimant would forfeit the remainder of its fee which would have been due to the Claimant, but for the breach.

[81] The Defendant has proved that a replacement sub-contractor was required to complete the contract after the work which was completed was assessed. He has also proved that the said sub-contractor completed the work and this is not disputed.

[82] However apart from the special damages already accounted for, there is no evidence of other consequential damage. There is therefore no further loss to be assessed as general damages.

Conclusion

[83] I therefore make the following order:

1. The Claimant's claim against the Defendant is dismissed in its entirety.
2. The Defendant is awarded Special damages in the sum of \$ 9500.00.
3. General damages on the Defendant's counter-claim are assessed to be the amount of the contract sum not paid to the Claimant and which would have been paid to the replacement sub-contractor.
4. The Defendant is also awarded interest at the rate of 6% per annum from the date of the judgment to the date of payment on the judgment sum.
5. Costs are awarded to the Defendant pursuant to part 65 of the CPR 2000.

[84] I apologise for the delay in delivering this judgment.

Francis H V Belle
High Court Judge